

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN SCOTT VARNER,

Petitioner,

Case No. 16-14388

v.

HON. AVERN COHN

ERICK BALCARCEL,

Respondent.

**ORDER GRANTING PETITIONER'S MOTION TO AMEND THE CAPTION
AND FINDING PETITIONER'S MOTION FOR AN EXTENSION OF TIME TO FILE A
NOTICE OF APPEAL MOOT (Doc. 39)**

I.

Kevin Scott Varner, ("Petitioner"), filed a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254. On September 7, 2017, the Court denied the petition and declined to issue a certificate of appealability. (Doc. 26). On October 13, 2017, the Court denied Petitioner's motion for amended or additional findings. (Doc. 29). On November 1, 2017, Petitioner filed a Notice of Appeal from the denial of the petition. (Doc. 30). On March 29, 2018, the Court denied Petitioner's motion for relief from judgment. (Doc. 36). On April 23, 2018, the Court denied Petitioner's motion for reconsideration of the denial of the motion for relief from judgment. (Doc. 38).

Before the Court is Petitioner's motion to amend the caption and a motion for an extension of time to file a notice of appeal from the denial of his motion for relief from judgment. (Doc. 39).

II.

As to the motion to amend the case caption, Petitioner asks that the caption be amended to reflect that the warden at the facility where he is incarcerated is now Erick Balcarcel. Because the proper respondent in a habeas case is Petitioner's custodian, the warden, the motion to amend is GRANTED. See Edwards Johns, 450 F. Supp. 2d 755, 757 (E.D. Mich. 2006); See also Rule 2(a), 28 foll. U.S.C. § 2254.

III.

As to the motion for an extension of time in which to file a notice of appeal from the denial of the motion for relief from judgment, Fed. R. App. P. 4 (a)(1) states that a notice of appeal must be filed within thirty days of the entry of the judgment or order from which the appeal is taken. Here, Petitioner filed his motion to extend time to appeal on April 23, 2018, which was within 30 days of the Court's March 29, 2018 order denying the motion for relief from judgment.

Where, as in this case, a motion for an extension of time that is filed within the time period for filing a notice of appeal can be construed to be a notice of appeal where it specifies the party taking the appeal and the judgment being appealed. See United States v. Gulley, 29 F. App'x. 228, 230 (6th Cir. 2002). As such, Petitioner's motion for an extension of time to file a notice of appeal is construed as a timely filed notice of appeal because it evinces an intent by Petitioner to file an appeal and contains the essential information needed to process the appeal. So construed, Petitioner's request for extension of time to file an appeal is MOOT.¹ Rather, Petitioner's motion (Doc. 39) is

¹To the extent that Petitioner wishes to appeal the denial of his motion for reconsideration, he must file a separate notice of appeal. See e.g. United States v.

considered a notice of appeal.

SO ORDERED.

S/Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: 5/9/2018
Detroit, Michigan.

Universal Management Servs. Inc., 191 F.3d 750, 756-57 (6th Cir.1999)